Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the Commercial	)	WT Docket No. 05-211
Spectrum Enhancement Act and	)	
Modernization of the Commission's	)	
Competitive Bidding Rules and	)	
Procedures	)	

REPLY COMMENTS OF T-MOBILE USA, INC.

T-Mobile USA, Inc. (T-Mobile) hereby submits its reply comments on the Commission's Further Notice of Proposed Rulemaking, issued February 3, 2006, in the above-captioned proceeding.[1/]

INTRODUCTION AND SUMMARY

Regardless of whether or not the Commission chooses to adopt some or all of the revisions proposed in the *DE FNPRM*, T-Mobile urges it to reach a decision promptly, so as not to delay the upcoming Advanced Wireless Services (AWS-1) auction. As many commenters point out, Auction 66 represents a vital opportunity for new entrants and existing carriers to obtain the spectrum they need to succeed in the highly competitive wireless marketplace. Given that the record support for the recommended changes is flimsy at best, the Commission should do everything within its power to prevent this proceeding from derailing the most important spectrum auction since the mid-1990s.

1/ *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*, WT Docket No. 05-211, Further Notice of Proposed Rulemaking, FCC 06-8 (rel. Feb. 3, 2006) ("*DE FNPRM*").

A number of commenters, representing businesses of all sizes, agree with T-Mobile that the record provides no basis for prohibiting designated entities ("DEs") from partnering with nationwide wireless carriers. There is no factual foundation to support a finding that these carriers or their DE partners have attempted to frustrate either the letter or the spirit of the Commission's DE policies. To the contrary, the support provided by established wireless carriers to individual DEs has strengthened the program and furthered the Commission's and Congress's goal of encouraging the participation of small businesses in the provision of spectrum-based services.

If spectrum concentration is the Commission's true concern, then there are much more direct ways of dealing with that problem. Imposing restrictions on DE investment will do nothing to prevent the acquisition of spectrum by incumbent carriers, but it will have the unfortunate consequence of hampering the ability of small companies to access essential capital and technical expertise.

Rather than rush to make controversial changes to the DE program, and thereby expose the Commission's decision to needless litigation, the Commission should take the time required to assess whether there actually are problems with the existing regime. If so, the Commission can engage in an appropriately targeted rulemaking. For purposes of the AWS-1 auction, the Commission could adopt more modest measures aimed at deterring sham bidders, including requiring small business DE partners to contribute a significant proportion of capital to the venture and subjecting certain types of DE applications to heightened scrutiny.

I. THE AWS-1 AUCTION SHOULD STAY ON SCHEDULE

Irrespective of their views on whether the Commission should adopt the proposals set forth in the *DE FNPRM*, a number of commenters agree that Auction 66 should proceed on schedule. Council Tree, the party that set this proceeding in motion, for instance, asserts that the "auction is a critical opportunity for smaller carriers and new entrants to acquire access to vital spectrum resources . . . and that opportunity should not be delayed."[2/] Similarly, RTG and OPASTCO emphasize that "ensuring that the AWS-1 auction takes place as scheduled is of paramount importance. . . . It has been RTG and OPASTCO members' experience that spectrum prices tend to go up when auctions are delayed, oftentimes putting spectrum out of reach for small carriers with limited resources."[3/] US Cellular also "strongly support[s] prompt Commission action in these proceedings to avoid delaying the June 29, 2006 schedule for commencing the auction for the AWS-1 licenses."[4/]

Although some commenters are concerned about the Commission's pronouncement that AWS-1 short-form applications may have to be amended post-filing to comply with newly adopted DE rules, for the most part, they do not advocate postponing the auction. Rather, they urge the Commission to complete its action in this proceeding as quickly as possible, allowing "the AWS auction to proceed largely on the

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2/ Council Tree Communications, Inc. ("Council Tree") Comments at 38-39.

3/ Rural Telecommunications Group ("RTG") and Organization for the Promotion and Advancement of Small Telecommunications Companies ("OPASTCO") Comments at 6.

4/ United States Cellular Corporation ("US Cellular") Comments at 13.

current schedule"[5/] or, alternatively, to "move forward in a timely manner with the auction under the existing designated entity rules."[6/]

T-Mobile has made clear that it has an immediate need for the licenses that will be offered in Auction 66. For T-Mobile to maintain or improve its market position, it must continue upgrading its systems and rolling out the advanced data and voice services demanded by consumers. These undertakings require significant additional spectrum. Although the Commission has indicated that it can bring this DE proceeding to a close in a timely fashion, T-Mobile agrees with several commenters that a preferable solution would be for the Commission to defer action on the rulemaking pending further analysis of the need for, and the most appropriate way to achieve, reform of the DE program.[7/] If such a deferral were announced promptly, it would have the benefits of providing regulatory certainty to prospective AWS-1 auction participants, especially small businesses seeking to raise equity capital and secure debt commitments, as well as avoiding the very real prospect of litigation resulting from hasty decision-making based on an incomplete record. In any event, the Commission should take all feasible steps to ensure that Auction 66 commences as planned on June 29, 2006.

[5/] MetroPCS Communications, Inc. ("MetroPCS") Comments at 14 n.23; *see also* Council Tree Comments at 62; National Hispanic Media Coalition *et al*. ("NHMC") Comments at 17-18 (suggesting that the Commission defer decision on the issue of including wireline providers in the rule until after Auction 66).

[6/] CTIA Comments at 16; *see also* Wirefree Partners III, LLC ("Wirefree") Comments at 16; National Telecommunications Cooperative Association ("NTCA") Comments at 8; Cook Inlet Region, Inc. ("Cook Inlet") Comments at 17-18 (encouraging the Commission to take the time to evaluate the need to reform).

[7/] As discussed below, even proceeding under existing rules, the Commission could put in place various new safeguards for the AWS-1 auction, including adopting Cook Inlet's proposal to require a significant equity investment from the small business partner in any venture seeking bidding credits.

II. THE DE REFORM PROPOSALS ARE ARBITRARY AND UNNECESSARY

More than a few commenters agree with T-Mobile that, taking into account all available evidence, there is no basis in law or policy for adopting the *DE FNPRM's* proposed rule changes. As Cook Inlet notes, Commission concern about any abuse of its rules is understandable, but "it is absurd to suggest that Council Tree has set out an appropriate solution to a problem when there is no specific identification of the problem or any evidence that a problem even exists."[8/] Verizon Wireless likewise argues that, to the extent the Commission is seeking to ensure that only "bona fide" DEs are acquiring spectrum or providing service to the public, the *DE FNPRM* "is not responsive to that concern." Instead, "the new restriction on DEs would reinvent the existing system and replace one set of complicated, but tested, standards, with innumerable shades of gray on how to evaluate a 'material relationship' and areas of overlap."[9/]

T-Mobile fully supports Commission efforts to strengthen its DE program and protect it from fraud and abuse. To that end, it encourages the Commission to consider measures that would actually help preserve the integrity of the program, such as Cook Inlet's proposal to require DEs to contribute some minimum amount of equity to any venture that seeks to bid with the benefit of government preferences. In addition, the Commission should dedicate its resources to enforcing strictly its current—and extremely comprehensive—set of DE rules. Arbitrarily restricting the participation of certain companies in the DE program, by contrast, will only jeopardize Congressional and Commission efforts to "ensure that small businesses, rural telephone companies, and

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8/ Cook Inlet Comments at 7.

9/ Verizon Wireless Comments at 3-4.

businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services."[10/]

In its comments, Council Tree expounds at length on the perils of industry consolidation, but it sheds no new light on the core question of why placing limitations on DE relationships with large wireless carriers is a reasonable way to address this issue. Indeed, Council Tree acknowledges that the proposed rule will be ineffective in achieving the company's purported goal of avoiding excessive concentration of licenses because national wireless service providers could still acquire licenses directly. Council Tree is correct—if the objective here is to prevent spectrum concentration, then the Commission should directly target that issue by imposing conditions on mergers or re-adopting a spectrum cap. "The fact that the wireless industry is undergoing a period of consolidation is unrelated to the designated entity program and the policies and objectives it was designed to promote."[11/]

Not only would adoption of the *DE FNPRM's* proposals undermine the Commission's DE program by hampering the ability of small businesses to obtain the funding and expertise they need to be meaningful participants in the wireless marketplace, singling out a handful of wireless companies for disparate treatment is arbitrary. Dobson correctly notes that, "[i]f it is proven true that the benefits designed for small businesses are instead being realized by large strategic investors, it surely should not matter whether that investor is an in-region incumbent wireless service provider or not."[12/] Cook Inlet adds that it "is not clear how the incentives or practices of these [large

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10/ 47 U.S.C. § 309(j)(4)(D).

11/ Cook Inlet Comments at 7.

12/ Dobson Communications Corporation ("Dobson") Comments at 2.

wireless] carriers are any more detrimental to the program than the incentives of any investor in a designated entity, whether a large financial institution, venture capital fund, small wireless carrier or otherwise."[13/] These commenters make a valid point—there is absolutely no reason to believe that Microsoft, Google, Wal-Mart, or any other company that has not entered the communications marketplace to date would somehow make a more "appropriate" DE partner than wireless carriers, especially considering that carriers put their entire businesses at risk if they ignore Commission directives.

Even if focusing solely on incumbent, in-region wireless carriers were sound policy, neither the Commission nor Council Tree provides a coherent explanation for the $5 billion "wireless gross revenues" cutoff criterion. This standard fails to take into account that the five carriers subject to the proposed rule vary considerably in the amount of spectrum they hold, or that regional carriers falling outside the rule's reach, such as Leap, MetroPCS, and US Cellular, have more spectrum and more customers than T-Mobile in a number of markets. Why should these carriers' DE partners qualify for bidding credits when they are competing head-to-head with T-Mobile for licenses in areas in which they already enjoy a spectrum advantage? And, why is the Commission not concerned that regional carriers could join together with a DE in a nationwide bidding consortium that would be eligible for preferences? Unless and until the Commission can demonstrate that disqualifying DEs that partner with the five largest wireless carriers while allowing Council Tree to team up with Leap Wireless, as it did in Auction 58,

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13/ Cook Inlet Comments at 13.

would advance the purposes of section 309(j), there is no basis for engaging in such discrimination.[14/]

CONCLUSION

For the foregoing reasons, T-Mobile urges the Commission to announce at the earliest possible date that it is deferring action on this proceeding until it has the opportunity to gather a full record aimed at identifying actual problems with the existing DE program and, should any be identified, crafting an appropriate solution. In the alternative, the Commission should conclude this proceeding as expeditiously as possible in order to ensure that the AWS-1 auction commences on schedule.

Respectfully submitted,

T-MOBILE USA, INC.

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[14/] *See, e.g., Melody Music, Inc. v. F.C.C.*, 345 F.2d 730 (D.C. Cir. 1965) (holding that the Commission must treat similarly-situated parties alike unless it explains reasons for differential treatment in light of the purposes of the Communications Act); *Bay Television, Inc.*, 9 FCC Rcd 3299, 3300 n.8 (1994) (same, citing *Melody Music*); *United Broadcasting*, 86 F.C.C.2d 452, 454 n.6 (1981) (same, citing *Melody Music*).